



**July 31, 2018**

**Ex Parte**

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Re: USTelecom Ex Parte Notice Connect America Fund, WC Docket No. 10-90

Dear Ms. Dortch:

On Friday, July 27, 2018, Alan Buzacott (Verizon), AJ Burton (Frontier), John E. Benedict (CenturyLink), Mary Henze (AT&T), Thomas Whitehead (Windstream), and the undersigned met with Suzanne Yelen, Alec MacDonell, Rodger Woock, Cathy Zima, Cha-Chi Fan and Stephen Wang (who participated by phone) of the Wireline Competition Bureau (Bureau) of the Federal Communications Commission (Commission). The purpose of the meeting was to discuss various issues relating to compliance obligations for recipients of Connect America Fund (CAF) support providing broadband service to fixed locations. In particular, we discussed various concerns with the recent order adopted by the Bureau in the above referenced proceeding (Order).<sup>1</sup> Each of these concerns is discussed below.

**1. The Bureau Should Align the Testing Regimes for Latency and Speed.**

During our discussion with staff, we pointed out that the Order establishes separate testing frameworks for speed and latency which is inefficient, burdensome, and unnecessary to ensure compliance with CAF obligations.<sup>2</sup> We recommended that rather than establishing two separate testing frameworks, the Bureau should instead combine both testing requirements under a single approach.

We pointed out that the Commission's Measuring Broadband America (MBA) testing program combines testing of speed and latency. Specifically, in the Technical Appendix accompanying the 2016 MBA Report, the Commission noted that the "latency under load test operates for the duration of the 30-second downstream and upstream speed tests, with results

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<sup>1</sup> Order, *Connect America Fund*, DA 18-710 (released July 6, 2018) (*Order*).

<sup>2</sup> *Id.*, ¶ 26 – 27.

for upstream and downstream recorded separately.”<sup>3</sup> We noted that the Order provides no justification for departing from the MBA practice, and does not appear to discuss the fact that the Bureau is setting up two separate testing programs. We highlighted support in the record recommending alignment of the speed and latency frameworks.<sup>4</sup>

The Order establishes two testing programs by adopting different requirements for speed and latency testing that would result in carriers having to develop separate processes for each. None of these differences are fully explained or justified. The Order would, for example, require companies to test each selected subscriber’s latency every minute for six hours a day for seven days each quarter.<sup>5</sup> By contrast, the Order requires carriers to test a for speed performance to each subscriber just once an hour during the six-hour test window.<sup>6</sup> The SamKnows MBA program requires hourly testing of latency and speed. The Order as written would require a carrier to collect and submit for a single subscriber 2,520 latency tests per quarter and 42 speed test results. No comment was ever sought on the latency proposal, and the Order provides no explanation or justification for the dramatically more extensive latency testing.

We explained that the significant disparity in the number of tests for speed and latency would make it hard for carriers to combine the instructions for testing into a single process. Testing every minute may also overload some testing methods and cause testing to be disrupted. Finally, there is no reason to require such extensive latency testing to prove that a carrier has met its CAF requirement.

We also expressed concerns regarding the significant disparity in compliance thresholds for both speed and latency. The Order establishes a higher 95% threshold for latency, which stands in stark contrast to the 80/80 threshold for speed.<sup>7</sup> We noted that the Bureau’s stated concerns regarding overly stringent thresholds for speed testing are equally relevant in the context of latency. Specifically, in adopting the 80/80 standard for speed, the Bureau noted

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<sup>3</sup> 2016 Technical Appendix, Measuring Broadband America, Fixed Broadband, A Report on Consumer Fixed Broadband Performance in the U.S., p. 34, (released December 1, 2016) (available at: <http://data.fcc.gov/download/measuring-broadband-america/2016/Technical-Appendix-fixed-2016.pdf>) (visited July 31, 2018) (*MBA Technical Appendix*).

<sup>4</sup> See e.g., Comments of the USTelecom Association, WC Docket No. 10-90, p. 13 (filed December 6, 2017) (stating that “adopting the same methodology is also administratively efficient for both participants and the Commission, which will be able to develop, implement, and monitor a single methodology regardless of how many programs are running concurrently.”).

<sup>5</sup> Order, ¶ 27.

<sup>6</sup> *Id.*, ¶ 28.

<sup>7</sup> See, *Id.*, ¶ 4 (establishing a 95% threshold for latency); *id.*, ¶ 51 (establishing an 80% threshold for download and upload speeds).

that the standard “allows sufficient leeway to providers so that they will meet performance standards as long as they have reasonable backhaul arrangements.”<sup>8</sup> By moving the latency standard to one more aligned with the testing standard for speed, we explained that the Bureau could achieve a more harmonized testing framework for ETCs under the CAF and a more efficient compliance and enforcement process for USAC and the Commission.

Finally, the Order appears to require ETCs to establish separate panelists for both speed and latency. The Order stipulates that latency testing must be conducted on 50 panelists, whereby panelists for speed testing may vary based on the ETC’s respective subscribership levels. Specifically, under the Order’s requirements for speed testing, an ETC may be required to test between 5 and 50 total subscribers.<sup>9</sup> However, it is unclear from the Order whether this same standard applies to latency panelists, since the table outlining the number of panelists is labeled “Required Test Locations for *Speed*.”<sup>10</sup>

In addition, the Order’s Appendix A summary describes the requirement as, “a maximum of 50 randomly-selected subscribers per state per speed tier for speed testing and 50 randomly-selected subscribers per state for latency.”<sup>11</sup> There is no reason that the number of panelists required for both speed and latency should not be identical, and ETCs should be permitted to utilize the same panelists to test for both.

## **2. It is Unclear From the Order Whether ‘On-Net’ Testing by ETCs is Permitted.**

The Order requires ETCs to test speed and latency from the customer premises of an active subscriber to a remote test server located at or reached by “passing through an FCC-designated IXP.”<sup>12</sup> In our discussions with staff, we explained that the Order is unclear as to whether an “FCC-designated IXP” includes testing to on-net servers controlled by the ETC and whether use of specific IXPs were required. During our discussion, we pointed out that the Commission has previously used phrasing to support the testing to such on-net servers. For example, in the Commission’s 2011 USF Transformation Order, it stated that it “adopt[ed] the proposal in the USF-ICC Transformation NPRM that actual speed and latency be measured on each ETC’s access network from the end-user interface to the nearest Internet access point.”<sup>13</sup>

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<sup>8</sup> *Order*, ¶ 53.

<sup>9</sup> *See, Id.*, ¶ 36.

<sup>10</sup> *Id.*, p. 14 (emphasis added).

<sup>11</sup> *Id.*, Appendix A, p. 28.

<sup>12</sup> *Id.*, ¶ 18.

<sup>13</sup> Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 77 FR 26987, 26 FCC Rcd 17663, at 17696, FCC 11-161, ¶ 111 (released November 18, 2011).

We pointed out that testing under the Commission’s MBA program includes testing to both on-net and off-net servers,<sup>14</sup> but that the CAF II testing framework should be conducted and controlled entirely by individual ETCs. We discussed that “FCC-designated IXP” likely meant any IXP operating in the metropolitan areas identified in the Order, and we asked that the Bureau state more clearly that on-net servers are suitable for testing and compliance purposes.

### **3. The Compliance Framework Should be More Incremental.**

We also discussed the compliance framework outlined in the Order, and noted that the current compliance framework goes directly to a 5% withholding for a Level 1 compliance gap. We pointed out that the Commission’s deployment milestones do not withhold CAF funding until an ETC has missed its milestones by more than 15%.<sup>15</sup> We questioned why the compliance framework for missing a speed or latency metric should be more severe than for missing a deployment milestone. We explained that such an approach is too stringent and could potentially impede – rather than facilitate – compliance by ETCs.

Specifically, the compliance framework would withhold essential CAF funding from ETC recipients for seemingly minor and correctable discrepancies. As a hypothetical, we noted that an ETC could meet all of its speed and deployment obligations, but if their compliance score on latency was anything less than 100% they would be subject to a seemingly disproportionate 5% withholding.<sup>16</sup>

Instead, we suggested the Commission follow the precedent it established in the deployment milestone framework where the first tier of non-compliance triggers simply a reporting requirement. We discussed adjustments to the Order’s “Compliance Levels and Support Reductions” that would qualify a compliance percentage score of 100% as equal to Full Compliance.<sup>17</sup> However, a Level 1 score should be between 95 – 99%, and should result in quarterly reporting but no withholding of funding. A score between 94 – 85% should fall into Level 2, and the first withholding of 5% would occur. Such an approach would thereby enable the ETC to address and correct what is likely a minor network issue. We noted that the withholding of CAF funds for such minor disparities – in already challenging high-cost areas – could hinder a carrier’s ability to come into full compliance.

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<sup>14</sup> *MBA Technical Appendix*, pp. 25 – 27.

<sup>15</sup> Report and Order, *Connect America Fund*, 29 FCC Rcd 15644, 80 FR 4445, ¶ 150 (released December 18, 2014).

<sup>16</sup> *Order*, p. 25.

<sup>17</sup> *Id.*

#### 4. Overprovisioning Should Not Justify Negating the Test Result.

Finally, we discussed our concerns regarding the Bureau's decision to exclude from certification calculations any speed measurements with values greater than 150% of the advertised speed.<sup>18</sup> First, we reminded staff that the CAF price-cap model based requirement is to deploy a network capable of meeting "a minimum speed standard of 10 Mbps downstream and 1 Mbps upstream,"<sup>19</sup> and that basing any CAF compliance structure on a speed in relation to an "advertised speed" is inappropriate. We disagreed with the Bureau's conclusion that "such values are likely invalid,"<sup>20</sup> and explained that many companies overprovision service as part of their network design and that a high speed test result does not reflect a problem with the testing infrastructure. We discussed a variety of business method, technologies and network design practices that may lead ETCs to regularly deliver speeds greater than the CAF required speed, including designing broadband networks to minimize stalling or congestion, initial low demand on newly deployed fixed wireless or cable facilities, and network management efficiencies.

We also pointed out that the Bureau's decision to automatically exclude speed measurements above a particular threshold are inconsistent with its simultaneous decision to include speeds below given thresholds. Specifically, the Order states that the Bureau will "not automatically exclude test results that are 'too slow,' because those results likely reflect poor performance or network congestion, rather than fundamental problems with the testing infrastructure."<sup>21</sup>

Given that the speed obligation for price cap carriers that accepted CAF II model support is to provide *at least* 10/1 service, measurements exceeding these speeds should not be discarded by the Bureau. We also explained that there is no mathematical rationale for excluding higher speed measurements where the test results will each be counted on a pass/fail basis and where test results are not averaged. The Commission should not attempt to implement a method to automatically weed out "testing infrastructure" failures until it has had the opportunity to analyze actual CAF speed test results.

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<sup>18</sup> *Order*, fn. 145.

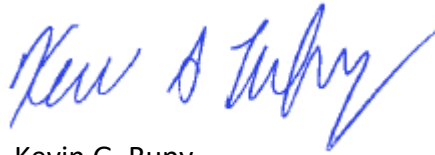
<sup>19</sup> *Id.*, ¶ 3.

<sup>20</sup> *Id.*, fn. 145.

<sup>21</sup> *Id.*

Pursuant to Commission rules, please include this ex parte letter in the above identified proceeding.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kevin G. Rupy", with a stylized flourish at the end.

Kevin G. Rupy  
Vice President, Law & Policy

cc: Suzanne Yelen  
Alec MacDonell  
Rodger Woock  
Cathy Zima  
Cha-Chi Fan  
Stephen Wang